83-958



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1983

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PORT OF TACOMA,

Petitioner,

v.

PUYALLUP INDIAN TRIBE,

Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In the absence of clear language confirming such a grant, is the mere historical dependence on the fishery resource contained in navigable waters within an Indian reservation established by executive order sufficient to overcome the established presumption against the conveyance of lands underlying such navigable waters?

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TREATY PROVISION

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Prosecuting Attorney for Kitsap County believes that the decision below, and the Petition for Writ of Certiorari submitted on behalf of Port of Tacoma, raise important issues concerning the ownership of real property underlying and adjacent to navigable waters, and the resulting issues concerning the exercise of state and local sovereign authority over activities thereon. A substantial portion of Kitsap County lies adjacent to the navigable waters of Puget Sound, waters which have previously been identified as usual and accustomed grounds for fishing rights of various Indian tribes of the Pacific Northwest. Kitsap County previously appeared as amicus curiae in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and

contains within its boundaries the Port Madison Indian Reservation, occupied by the Suquamish Indian Tribe, said tribe having made ownership claims of a nature similar to those made by the Puyallup tribe in this case. Kitsap County is not and never has been a party to this suit, but is familiar with the issues presented.

## REASONS WHY WRIT SHOULD ISSUE

### I. The decision below is inconsistent with this Court's decision in Montana v. United States.

In Montana v. United States, 450 U.S. 544 (1981), the Court reaffirmed the rule of United States v. Holt State Bank, 270 U.S. 49 (1926), and the heavy presumption against conveyances of property underlying navigable waters. Of particular importance to this case is the Court's

conclusion that general language preserving rights of hunting, fishing and passage, and language authorizing exclusive occupation, does not overcome this presumption. Finally, the Court analyzed and distinguished as exceptional the case of Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) in which a plurality of this Court held, based on the peculiar historical circumstances and treaty language involved, that the reservation grant did include the bed of a navigable river. Montana v. United States, supra, 450 U.S. at 555, fn. 5.

By contrast, in this case, the Ninth Circuit Court of Appeals has elevated to a level of at least equal importance the principle of statutory construction that "treaties with the Indians must be interpreted as they

would have understood them, . . .and any doubtful expressions in them should be resolved in the Indian's favor." Puyallup Indian Tribe v. Port of Tacoma, supra, 717 F.2d 1251, 1257 (9th Cir. 1983). In an effort to "accord appropriate weight to both" this rule of statutory construction and the legal presumption against conveyances of beds of navigable waters, the Court concluded at page 1258:

> . . .that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.

This approach is obviously inconsistent with Montana. While the

principles of statutory construction played little, if any, role in the decision in Montana, they are virtually outcome determinative in the Ninth Circuit view since the government's awareness of the Indians' use of a water resource, when coupled with this rule of construction, is sufficient without more to overcome the Holt State Bank presumption.[1]

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[1]Interestingly, the Ninth Circuit failed to contrast the language actually used in the creation of this reservation with that used in conjunction with other reservations of this era and geographical location. For example, the executive orders used to identify both the Tulalip and Lummi Reservations on Puget Sound in 1873 contain specific calls to low-water marks establishing boundaries along bodies of navigable waters. United States v. Romaine, 255 Fed. 253 (9th Cir. 1919); United States v. Snohomish River Boom Co., 246 Fed. 112 (9th Cir. 1917). The failure to make similar specific reference in the order reestablishing the Puyallup Reservation is obviously probative of an intent not

The Ninth Circuit's reliance on Choctaw Nation is clearly misplaced. While that case was resolved on the basis of highly peculiar historical circumstances, as well as unusually specific treaty language providing that none of the lands involved would become part of any state or territory, and while these distinguishing features were made clear in Montana, the Ninth Circuit has adopted its rule of statutory construction on a level of at least equal importance with Holt State Bank and the long standing equal footing doctrine. The court below has simply failed to recognize Choctaw Nation as the "singular exception" in an

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to convey lands beneath the Puyallup River -- consistent with equal footing doctrine and the Holt State Bank presumption in favor of state sovereignty.

"established line of cases." Montana v. United States, supra, 450 U.S. at 555, fn. 5.

Finally, the circumstances surrounding the Puyallup reservation are in no way similar to those presented in Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). While Article II of the Treaty of Medicine Creek reserved certain lands for Indian occupation, Article III went further and secured to the Indians the right of taking fish "at all usual and accustomed grounds and stations." Article III has since been held to require an allocation of the fishery resource between Indians and non-Indians; Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); as well as a requirement that both the tribes and the State take

reasonable measures to preserve and enhance the fishery resource. United States v. Washington, 694 F.2d 1374 (9th Cir. 1982), rehearing pending, 704 F.2d 1141 (9th Cir. 1983).

Thus, regardless of whether their reservation carried title to the bed of the Puyallup River under Article II, the Puyallup Indians were and are assured of access to the fishery resource upon which they have found to be dependent. This not only distinguishes the Puyallups from the Metlakahtal Indians occupying the Annette Islands (who apparently had no independent fishery resource rights), but further suggests there is no basis for overturning the Holt State Bank presumption against conveyances of beds underlying navigable waters. If the resource access needs of the Indians

were to be fulfilled under Article III, there would have been no reason to convey title to the beds underlying those "usual and accustomed" waters. In its decision in this case, the Ninth Circuit has failed to recognize that, contrary to the situation in Alaska Pacific Fisheries, the resource access needs of the Indians were provided for in a manner consistent with the Holt State Bank presumption.

In short, the Ninth Circuit decision in below is inconsistent with the principles announced in Montana v. United States, supra, and the Writ of Certiorari should issue.

II. The decision below is inconsistent with the decision of another panel of the Ninth Circuit Court of Appeals in United States v. Aranson.

In United States v. Aranson,

696 F.2d 654 (9th Cir. 1983), cert. denied, ___ U.S. ___ (November 14, 1983), the Ninth Circuit Court of Appeals was required to determine the title to a portion of the bed of the Colorado River along the western boundary of the Colorado River Indian Reservation. With reasoning similiar to Port of Tacoma, the original opinion found the river bed to be part of the reservation. That opinion was withdrawn in light of Montana v. United States, supra, and the court ultimately reached precisely the opposite result. The Aranson court specifically recognized that Montana rejected an approach which determined title on the basis of elementary rules of statutory interpretation concerning Indian tribes and their understanding of treaties. United States v. Aranson, supra, 696

allotments for private ownership indicated an intent not to abrogate the presumption against conveyances. While the Puyallup Reservation has been largely disintegrated through extensive allotment; Puyallup Tribe v. Department of Game of the State of Washington, 433 U.S. 165, 174 (1977); there is no recognition that for reservations destined for assimilation into non-Indian communities; Montana v. United States, 450 U.S. at 559; Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); there would be no purpose in abrogating state sovereignty.

Thus, in numerous areas, the decision below is inconsistent with the Seventh Circuit decision in Wisconsin v. Baker, and a Writ of Certiorari should issue to resolve that conflict.

IV. The decision below

provides for an inappropriate means of determining ownership of real property.

Under the holding in Port of Tacoma, the ownership of real property is dependent upon judicial determinations as to the dietary and subsistence needs of communities in existence more than one hundred years ago. Obviously, these decisions are based upon differing perceptions and opinions as to the degree of dependence, as illustrated by the trial court's findings, and subsequent review thereof, in Montana v. United States, supra, 450 U.S. at 570 (Blackman, J. dissenting). The ownership of real property is an area of law where the interests of certainty and finality are paramount. Even the Ninth Circuit Court of Appeals has recognized the importance of these property ownership questions and has

suggested review by this Court given the uncertainties involved. United States v. Washington, 694 F.2d 188, 189 (9th Cir. 1982), cert denied, ___ U.S. ___ (June 27, 1983). The Ninth Circuit formulation leaves questions of real property ownership in a highly uncertain and speculative posture which can only work to the eventual detriment of the tribes, the states, and the successors in interest of each.

This nation was founded on the beliefs that it is better to distribute power evenly than unevenly throughout a union of states, and that a local government is better able than a national government to promote public welfare in matters of local concern. In exceptional circumstances, Congress may depart from its usual course with an assessment of the degree to which the

interests of interstate and foreign commerce and local control of the public welfare should be diminished to serve a more paramount purpose. The Ninth Circuit rule, however, is destined to have a substantial adverse effect on state sovereignty in western states where Indian tribes were located and relocated in areas of ready access to the very rich natural resources of the public waterways. The opportunity for Congress to weigh the relative merits of state sovereignty and the peculiar needs of individual tribes is lost under the Ninth Circuit formulation, and the interests behind the equal footing doctrine are substantially diminished as a result.

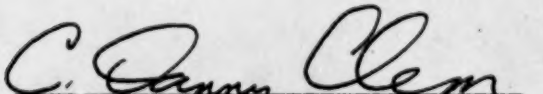
## CONCLUSION

For the foregoing reasons, amicus curiae Kitsap County urges that a

Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATED this 5th day of January, 1984.

Respectfully submitted,



C. DANNY CLEM
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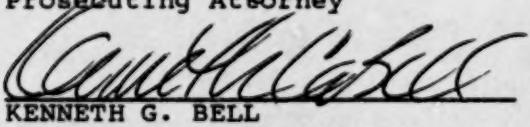

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## PROOF OF SERVICE

STATE OF WASHINGTON)
: SS
County of Kitsap )

C. DANNY CLEM, having first been duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein.

That on the 5th day of January, 1984, he deposited in the mails of the United States of America, postage prepaid, the original and forty (40) copies of the Brief of Amicus Curiae in Support of Petition for Writ of Certiorari to the Clerk of the United States Supreme Court, U.S. Supreme Court Building, 1 First Street, Washington,

D.C. 20543 and one (1) copy of the same to John Howard Clinebell, Attorney at Law, Office of Puyallup Indian Tribe, 2215 East 32nd, Tacoma, Washington 98404 and to James J. Mason, Attorney at Law, 1008 South Yakima Avenue, Tacoma, Washington 98405.

C. DANNY CLEM

SUBSCRIBED AND SWORN to before me this 5th day of January, 1983.

NOTARY PUBLIC in and for the State of Washington, residing at Bremerton.